

United States v. Cruz, No. 05-10189

MAR 17 2006

REINHARDT, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I disagree with the majority's conclusion that the district court did not abuse its discretion in dismissing five jurors for cause on its own motion. Although I agree that Cruz "presented no evidence that any of the jurors that found him guilty were unable or unwilling to properly perform their duties," *United States v. Padilla-Mendoza*, 157 F.3d 730, 734 (9th Cir. 1998), I do not find that such a showing is required under the circumstances. Accordingly, I would reverse the district court's judgment of conviction.

The district court abused its discretion in dismissing at least two jurors without inquiring as to whether their expressed sympathy would impede their ability to serve impartially. One of the jurors stated specifically that although "it would be tough for [her] if [Cruz] came back to the country to see his kids," she "would try to put aside [her] sympathies." The other juror stated that she could empathize with Cruz, because her family had been in a similar situation, but never stated that she would not be able to serve as an impartial juror. In both instances, the district court did not further question the jurors "as to their ability to faithfully and impartially apply the law," nor did it ask any questions "to determine the nature and extent of their commitment to any principles that might have impaired their ability to serve impartially." *Padilla-Mendoza*, 157 F.3d at 733 (quoting

United States v. Salamone, 800 F.2d 1216, 1226 (3d Cir. 1986)) (internal quotation marks omitted). Further, the district court excluded another juror who expressed sympathy for the defendant, given his family situation, after inquiring only whether such sympathy “might play a role,” to which the juror responded that it could, but that she “would try to be fair.”

In *Padilla-Mendoza*, we held that where the district court’s abuse of discretion “results in the wholesale exclusion of a particular group, [it is not] necessary for the defendant to affirmatively demonstrate the existence of actual prejudice in the resulting jury panel.” *Id.* at 734 (quoting *Salamone*, 800 F.2d at 1227). In this case, the district court dismissed several jurors based solely on the fact that they were part of a group that “might be influenced by sympathy” for the defendant, without inquiring further as to the jurors’ ability to be impartial regardless of such sympathy. It can hardly be said that feeling sympathy for a defendant who finds himself in a difficult position is grounds to be excluded for cause; instead, the dispositive inquiry is whether, regardless of such sympathy, the juror will be able to serve impartially. Here, the jurors were excluded before the latter question could be determined. Therefore, I cannot agree that the district court’s exclusion of such jurors did not constitute reversible error and accordingly, I respectfully dissent.